78-1250

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1978

JOHN D. BRAZIL,

Petitioner,

vs.

SAMBO'S RESTAURANTS, INC.,

Respondent.

BRIEF IN OPPOSITION

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The petition and appendices thereto fail to note that the unreported order of the court of appeals bears the stamped notation: "Unpublished Order, Not To Be Cited Per Rule 35". (App. 1, *infra.*).

Rule 35 of the Rules of the United States Court of Appeals for the Seventh Circuit (App. 2-App. 4, *infra.*) authorizes the entry of unpublished orders in appeals that present arguments which "are not of general interest or importance."

QUESTION PRESENTED FOR REVIEW

Whether, on the factual record in this case, the dismissal of plaintiff's action for want of prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure was an abuse of discretion.

STATEMENT OF THE CASE

Although the question presented is a factual question, petitioner's statement of the facts is neither complete nor accurate. The facts appearing in the transcripts and affidavits (Pet.App. 10a-29a) and summarized in the opinion of the court of appeals (Pet.App. 1a-5a) present a very different picture of the record.

Petitioner fails to mention, for example, that what he now calls "the discovery that remained to be completed" (Pet. 4) is discovery that had never even commenced; or that his counsel acquiesced in the trial setting which he subsequently disregarded; or that no one troubled to give advance notice either to the court or to the defendant that petitioner would not go forward on the trial date that had been specially set two months before. (Pet.App. 1a-5a). Indeed, even after dismissal and while asking for reconsideration, petitioner told the court that he would not be ready to proceed until he had completed depositions which he had not even noticed until the eve of trial.* (Pet.App. 11a-17a).

Petitioner's statement that "no discovery cutoff date was established" (Pet. 4) is incorrect; petitioner was plainly told to complete discovery before the trial date (Pet.App. 20a-21a). Moreover, there is nothing in any rule of court which makes a "final pretrial order" (Pet. 4) a prerequisite to trial.**

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* Petitioner's statement that on September 20, 1977 "various depositions had been set for the following month" (Pet. 4) hardly discloses the fact that petitioner waited until the afternoon before the trial date to notice depositions to be taken *after* the trial date. (Pet. 13a, 24a).

** Under Rule 16, Fed. R. Civ. P., the use of pretrial orders is discretionary with the district court. In the Northern District of Illinois, each district judge has his own pretrial procedure; some judges, including the district judge below, do not use pretrial orders at all.

Petitioner also assumes in his statement of the case, as well as in his statement of the question presented for review, that the responsibility for the dismissal was "*solely*" that of his attorney. (Pet. 3). The record does not bear him out. The affidavits of his counsel show that petitioner was in communication with his counsel and must have been aware of the trial date as soon as it was set.* (Pet.App. 11a). They further show that petitioner himself had assumed responsibility for gathering the facts and submitting them to counsel. (ibid.). Nevertheless, petitioner failed to furnish the factual summary requested by counsel until August, 1977, the month before the trial date, and altogether failed to provide his counsel with the witnesses' statements which he had agreed to furnish. (Pet. App. 11a, 16a). Moreover, neither he nor his trial counsel appeared when the case was called for trial. (Pet.App. 2a).

The court of appeals found, *inter alia,* that petitioner's counsel "decided unilaterally that he was not going to proceed to trial on the Court's designated date"; that his conduct manifested "unqualified indifference" to his court commitment, "flagrant disregard" of the trial date and "unqualified disregard" for the Court's docket; that

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* Petitioner himself recognizes that, in the absence of evidence to the contrary, it is appropriate to assign some responsibility to the client for the conduct of his attorney. In his discussion of *Link* v. *Wabash R. Co.,* 370 U.S. 626 (1962), petitioner states (Pet. 16):

> Although the *Link* opinion does not refer to any act on the part of the plaintiff himself that influenced the court to affirm the dismissal, it would not have been unreasonable to assign some responsibility for the dismissal to the plaintiff when he had allowed his attorney to delay the disposition of the matter for over six years.

"plaintiff's counsel had every opportunity to either prepare himself for the scheduled trial date, or make timely arrangements for the action to be continued" but "chose to do neither." (Pet.App. 4a-6a).

After reviewing the record, the court of appeals found that petitioner "has cited *no facts* to sustain a charge of abuse of discretion on the part of the trial court." (Pet. App. 3a) (Emphasis supplied.)

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Acknowledged the Lack of General Importance of This Case.

This Court's Rule 19 provides that review on writ of certiorari will be granted only "where there are special and important reasons therefor." No such reasons exist in the instant case. The court of appeals acknowledged the lack of general interest or importance when it elected under its Rule 35 not to publish its opinion. (App. 1, *infra*). Seventh Circuit Rule 35 (App. 2-App. 4, *infra*) provides for unpublished orders in appeals which

> present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance. (Rule 35 ¶(c)(a)(ii)).

II. The Petition Seeks Only a Review of the Facts.

The single issue raised by the petition is whether, under the circumstances of this case, it was an abuse of discretion to dismiss the action for want of prosecution. As the court of appeals recognized, this is plainly an issue which turns solely upon an analysis of the particular facts involved: "each case must be examined with regard to its own peculiar procedural history and the situation at the time of dismissal." (Pet.App. 3a).

This Court stated in *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." A grant of certiorari is particularly inappropriate where, as here, the court of appeals concurs in the findings of fact made by the district court. As this Court has often held:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error. *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) and cases cited; *Berenyi* v. *Immigration Service*, 385 U.S. 630, 635 (1967).

III. The Decision Below Does Not Conflict With the Decisions of Other Circuits.

Petitioner argues that the decision below conflicts with decisions of other courts of appeals to the effect that dismissal of an action for want of prosecution, when based solely upon the conduct of counsel, may be invoked only under extreme circumstances.

The supposed conflict does not exist. The factual record amply supports the conclusion that the circumstances which justify dismissal of an action for want of prosecution are present in the case at bar. The court of appeals found that there were "no facts" to sustain a charge of abuse of discretion (Pet.App. 3a) and that the actions of plaintiff's counsel evidenced an "unqualified indifference" and "flagrant disregard" of the scheduled trial date and the Court's docket. (Pet.App. 4a). Nor does the record exonerate petitioner himself from responsibility (see *supra*, p. 3).

The cases from other circuits cited by petitioner (Pet. 10-13) are factually inapposite. On the other hand, the case of *Jameson* v. *DuComb*, 275 F.2d 293 (7th Cir. 1960) to which petitioner now says he "takes no exception" (Pet. 15), is in our view and in the view of the court of appeals substantially indistinguishable from the case at bar. (See Pet.App. 5a). The *Jameson* case was less than a year old when it was dismissed; no prior continuances had been sought by plaintiff; the interval between the setting day and the trial date was only a little more than four months. As in the case at bar, the court had set aside the date for the trial of the case. Indeed, with respect to discovery, Jameson had shown more diligence than petitioner; Jameson had at least noticed depositions in advance of the trial date and had attempted to take them before trial. Nevertheless, the court affirmed the dismissal because Jameson, like petitioner, was not ready for trial and did not appear.

Finally, irrespective of the relative responsibility of petitioner and his counsel, the court of appeals noted that to excuse petitioner from the consequences of his counsel's acts would shift the burden to defendant. (Pet.App. 6a).

IV. The Decision Below is in Harmony With the Decisions of This Court.

The decision below is plainly supported by *Link* v. *Wabash R. Co.*, 370 U.S. 626 (1962). Although petitioner quotes at length from the dissent in *Link* and mentions that it was a four to three decision (Pet. 16-18), petitioner does not appear to be asking that *Link* be overruled. Moreover, since petitioner now approves the *Jameson* holding, he can no longer seek to distinguish *Link* on the theory that only a long history of misconduct can justify dismissal. (See Pet.App. 5a).

Petitioner now assumes that this Court in *Link* assigned "some responsibility for the dismissal" to the plaintiff for allowing his attorney to be dilatory, even though the opinion says nothing to this effect. (Pet. 16). Such an assumption, however, does not avail petitioner. As noted above (*supra*, p. 3), there is a far more substantial basis for making such an assumption in the case at bar: the affidavits of petitioner's own counsel confirm petitioner's share in the failure to prosecute the case.

Petitioner's comments on the problems of trying malpractice cases in Illinois seem to us to be completely beside the point.

CONCLUSION

It is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Argued May 24, 1978)

September 11, 1978

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

Before

Hon. THOMAS E. FAIRCHILD, *Chief Circuit Judge*

Hon. PHILIP W. TONE, *Circuit Judge*

Hon. ROY W. HARPER, *Senior District Judge**

No. 77-2231

JOHN D. BRAZIL,

Plaintiff-Appellant,

vs.

SAMBO'S RESTAURANT, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 77 C 1044,
JULIUS J. HOFFMAN, *Senior Judge.*

ORDER

APPENDIX II

ARTICLE III. PUBLICATION RULE

Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of this circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per curiam. Orders shall not be published and opinions shall be published.

(1) "Published" or "publication" means:

(i) Printing the opinion as a slip opinion;

(ii) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(iii) Permitting publication by legal publishing companies as they see fit; and

(iv) Unlimited citation as precedent.

(2) Unpublished orders:

(i) Shall be typewritten and reproduced by copying machines;

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

(iii) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth;

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

(c) Guidelines for Method of Disposition.

(1) Published opinions: Shall be filed in signed or per curiam form in appeals which

(i) Establish a new or change an existing rule of law;

(ii) Involve an issue of continuing public interest;

(iii) Criticize or question existing law;

(iv) Constitute a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law; or

(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which

(A) are frivolous or

(B) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(aa) a controlling statute or decision determines the appeal;

(bb) issues are factual only and judgment appealed from is supported by evidence;

(cc) order appealed from is non-appealable or this court lacks jurisdiction or appellant lacks standing to sue; or

(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(A) are not frivolous but

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

(d) Disposition is to be by Order or Opinion.

(1) The determination to dispose of an appeal by unpublished opinion shall be made by a majority of the panel rendering the decision.

(2) The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

(3) Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.